

ORIGINAL

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.

SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

NORMAN P. LEVENTHAL
MEREDITH S. SENTER, JR.
STEVEN ALMAN LERMAN
RAUL R. RODRIGUEZ
DENNIS P. CORBETT
BRIAN M. MADDEN
BARBARA K. GARDNER
STEPHEN D. BARUCH
SALLY A. BUCKMAN
NANCY L. WOLF
DAVID S. KEIR
DEBORAH R. COLEMAN
NANCY A. ORY
WALTER P. JACOB
LINDA D. FELDMANN
RENÉE L. ROLAND
ROSS C. GREENBERG
JOHN D. POUTASSE
MATTHEW H. BRENNER*

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OFFICE OF THE SECRETARY

WRITER'S DIRECT DIAL
202-416-6770

WRITER'S E-MAIL
BMADDEN@LSL-LAW.COM

*ADMITTED CA ONLY

VIA HAND DELIVERY

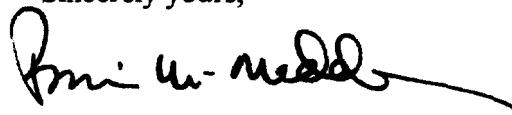
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Dear Mr. Caton:

On behalf of ECI License Company, L.P., there are transmitted herewith an original and four copies of its Petition for Reconsideration in MM Docket No. 96-58.

If any additional information is desired in connection with this matter, please contact the undersigned counsel.

Sincerely yours,



Brian M. Madden

BMM/tlm
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BEFORE THE

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Federal Communications Commission

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendments of Parts 73 and 74 of the
Commission's Rules To Permit Certain
Minor Changes in Broadcast Facilities
Without a Construction Permit

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MM Docket No. 96-58

To: The Commission

PETITION FOR RECONSIDERATION

ECI License Company, L.P. ("ECI"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby seeks reconsideration of the Commission's *Report and Order* in the above-captioned proceeding, FCC 97-290 (released August 22, 1997) ("*Report and Order*").¹ ECI seeks reconsideration of the Commission's conclusion that supplemental methodologies may not be used in any FM allotment case to establish the required coverage of the designated community of license. *Report and Order* at ¶ 69 and n.52. The Commission's conclusion fails to accommodate established Commission precedent that expressly authorizes the use of supplemental methodologies by certain qualified proponents of FM channel allotments. For the reasons set forth herein, ECI requests reconsideration and further clarification of the Commission's policies regarding supplemental showings in these narrow circumstances.

In response to a request for clarification of Commission policy with respect to the

¹ The *Report and Order* was published in the Federal Register on September 30, 1997, 62 Fed. Reg. 51052 (1997). Therefore, this Petition is timely filed. 47 C.F.R. § 1.429(d) (1997).

use and acceptance of supplemental methods to establish contour coverage, the Commission stated in the *Report and Order* that “supplemental showings [have not been approved] to establish city coverage from an FM allotment reference site located beyond the 70 dBu contour, as predicted by the standard contour prediction method in 47 C.F.R. Section 73.313.” *Report and Order* at ¶ 69. The Commission explained:

The staff examined past allotment rule making proceedings in which the use of supplemental showings was considered in a rule making proceeding, but was unable to find any proceeding in which a supplemental showing was accepted and an allotment created which located the 70 dBu contour beyond the location predicted by the standard contour prediction method. Thus no precedent exists for such usage. Because FM commercial one-step construction permit applications to upgrade or change channel use the same procedures as allotment rule makings with respect to allotment reference coordinates, no application has been granted where the applicant sought to employ a supplemental showing for the allotment reference coordinates.

Id. at ¶ 69 n.52.

ECI acknowledges that it is the Commission’s general policy that actual terrain data typically may not be used in the rule making context when determining whether the city grade contour of a proposed station will cover its community of license. *See* 47 C.F.R. § 73.315(a). This policy reflects the Commission’s concern that, at the allotment stage, it is generally unable to discern what specific transmitter site will ultimately be applied for and whether the rule making proponent will actually be awarded the construction permit; for a new FM allotment, for example, any number of applications, each utilizing a different proposed

transmitter site, may be filed. Under these circumstances the consideration of technical specifications for a particular transmitter location in the allotment proceeding would be inappropriate, since the ultimate site constructed after the conclusion of the application stage could well be different from that advanced by the rule making proponent.

These uncertainties are not present at the application stage, however, and applicants are permitted to employ supplemental showings to demonstrate city grade coverage, as acknowledged in the *Report and Order* at ¶ 70. In considering an individual application, the Commission will permit the applicant to rely upon actual terrain conditions or, in circumstances when an appropriate foundation is established, to use alternative coverage prediction methodologies (such as Tech Note 101 studies) to demonstrate adequate city coverage to satisfy the rules. *Id.*

In one limited set of circumstances, the Commission has reached the well-reasoned conclusion that the distinction drawn between the allotment and the application procedures is immaterial, and that these two stages should be treated similarly. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Woodstock and Broadway, Virginia)*, 3 FCC Rcd 6398, 6399 (1988) ("*Woodstock*"). It is in this connection that ECI requests reconsideration of the conclusions set forth at paragraph 69 of the *Report and Order*.

In *Woodstock*, the Commission held that the presumption of uniform terrain at the allotment stage may be relaxed — that is, actual terrain data may be used — when all the following conditions are satisfied: (1) a new allotment is not being requested (*e.g.*, where the

allotment at issue is for an upgrade to a higher class of channel by an existing station); (2) competing applications will not be accepted by the Commission for the allotment sought; and (3) the applicant has identified a specific transmitter site for which it has secured assurance from the owner that the site will be available and has assurance that the site meets requisite FAA requirements. *Id.* It is in these specific circumstances that the Commission has assurance, just as it has assurance at the application stage, that the site for which a specific coverage showing is offered will, in fact, be the site from which the station will be authorized to operate. As the Commission explained in *Woodstock*,

[a]lthough we reiterate that the assumption of uniform terrain at the allotment stage is generally appropriate, we believe it would elevate form over substance to apply that assumption here, where the petitioner has taken the affirmative steps necessary to allow us to evaluate a specific site, and our rules insure that petitioner will be the only applicant for the allotment.

Id.

Thus, under well-established Commission precedent, a qualifying proponent in a rule making proceeding² may, in these limited circumstances, use actual terrain data to demonstrate compliance with the requirements of Section 73.315(a) of the Commission's Rules for purposes of amending the FM Table of Allotments. In these circumstances, the Commission recognizes that the allotment proposal before it is in actuality a hybrid, combining a rule making proceeding and an application filing, for which there is no logical basis for treating the two in a

² This includes "one-step" upgrade applications, which incorporate both the rule making process and the application process in a single proceeding.

disparate manner — when the allotment at issue is not available for competing proposals and the party seeking the allotment has secured assurance of the availability and suitability of a specific site, the rule making proposal is more nearly like an application, and, as the Commission observed in *Woodstock*, it would “elevate form over substance” to adhere to differing standards with respect to assessing the city coverage showing made by the proponent/applicant.

The logic of the *Woodstock* exception applies with equal force to the use of supplemental showings at the allotment stage for those upgrade proponents who meet the *Woodstock* criteria. Where a rule making involves only one possible applicant (*e.g.*, where the allotment at issue is for an upgrade to a higher class on a co-channel or adjacent-channel by an existing station for which competing applications are expressly prohibited, *see* Section 1.420(g)(3)), and the proponent/applicant has obtained assurances of site availability and FAA approval, it follows that the rule making proponent should be permitted to employ supplemental showings, just as the applicant is permitted to do at the application stage. *Compare Woodstock* at 6399.

Although there appear to be no published decisions in which an allotment based on a supplemental showing has been granted, the Commission has expressly recognized in prior rule making decisions that such showings may be permissible. For example, in the context of a proposal by the licensee of Station KZSQ(FM), Sonora, California, to substitute Channel 224B1 for Channel 224A, the Allocations Branch recognized the validity of a supplemental showing in the rule making stage to rebut opposing comments contending that the licensee had not

demonstrated that its proposal could provide a 70 dBu signal over the proposed community of license. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Station (Sonora, California)*, 6 FCC Rcd 6042, 6043 (Alloc. Br. 1991) (“*Sonora*”). Significantly, although the Allocation Branch ultimately denied the rule making petition, it did so because the supplemental showing was “flawed,” not because of the use of the showing itself. In *Sonora*, the study was rejected because the proponent inappropriately combined a propagation methodology to predict received field strengths with a few of the detailed procedures for making and reporting actual field strength measurements taken in the field in a specific community. *Id.*

Similarly, the Policy and Rules Division considered a supplemental showing in a rule making proposal for a co-channel upgrade at Caldwell, Texas, even though it ultimately rejected the upgrade because the proponent of the station failed to meet the required “threshold requirements” for the use of Tech Note 101 showings.³ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Caldwell, College Station and Gause, Texas)*, 11 FCC Rcd 5326, 5327 (Pol. and Rules Div., 1996) (“*Caldwell*”). Again, the decision to deny the rule making petition was not based on the fact that a supplemental showing was proffered, but because of the way the showing was made. *Id.* *See also Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Creswell, Oregon)*, 4 FCC Rcd 7040, 7041-42 (although petitioner’s Tech Note 101 study demonstrating city coverage was rejected because of “questionable assumptions” and other flaws, the decision noted without objection that such

³ The threshold requirements in effect at the time were substantially similar to those articulated by the Commission in the *Report and Order* at ¶ 70.

supplemental Tech Note 101 showings are “sometimes submitted ... in cases such as [*Creswell*] where the terrain departs widely from ‘average terrain.’”).

In another instance, the Allocations Branch implicitly endorsed the use of a supplemental showing by a permittee seeking an adjacent channel upgrade. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Ocracoke, Edenton, Columbia, Pine Knoll Shores, North Carolina)*, 9 FCC Rcd 2011 (Alloc. Br. 1994) (“*Ocracoke*”).

Although the requested substitution of Channel 224C1 for Channel 225A, at Ocracoke, North Carolina, was denied, the Allocations Branch stated that it reached its decision because “no technical study was submitted [by the petitioner] which definitely showed the predicted contour as encompassing all of the community.” *Id.* at 2012. The Allocations Branch was thus amenable to consideration of a proper supplemental showing in the rule making, had one been provided.

Another example where the submission of a Tech Note 101 study was proffered in a rule making proceeding is found in *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Saltville, Virginia and Jefferson, North Carolina)*, 11 FCC Rcd 5234, 5237 (Pol. and Rules Div., 1996), where the Policy and Rules Division noted that the use of Tech Note 101 methodologies has not been “sanctioned ... for the comparison of *population* coverage areas.” However, the case further observed that the rules permit the use of “propagation methodology different from the Commission’s F(50,50) curves ‘in cases where the terrain departs .. widely’ from average terrain and ‘the contour distances [are] different from what may be expected in practice.’ This constitutes the threshold criterion for the use of an alternative

propagation methodology.” *Id.* at 5236 (emphasis supplied and footnote omitted). The decision does not reject the applicability of a Tech Note 101 study in the context of predicted signal coverage — it was the use in this case to predict the number of people to receive service from the change in allotments that was denied.

While the *Report and Order* notes that no rule making decision has been approved in reliance upon a city coverage showing made by the use of a supplemental prediction methodology such as Tech Note 101, *Report and Order* at n.52, it is equally true that there is no published decision in which a properly conducted supplemental showing was submitted and rejected by the Commission in any case which qualified for consideration under the *Woodstock* policies. The reliance upon actual terrain data as permitted under *Woodstock* and the use of alternative prediction methodologies, such as Tech Note 101, which depend on actual terrain conditions, afford the benefit in these instances of ensuring that a proposal/application is evaluated in a manner which reflects actual conditions.⁴ ECI submits that, in those limited cases defined by *Woodstock*, there is no logical basis for distinguishing among these similar forms of supplemental showings.

As established by the foregoing, ECI submits that it is clear that the Commission

⁴ There is no controversy about the reliability of Tech Note 101 studies. In previous cases, and as codified in the *Report and Order*, the Commission has established certain qualifying criteria of the use of these studies in the application stage, and is therefore obviously comfortable with the manner in which these studies are conducted and with the validity of their results. Moreover, the Commission has relied upon Tech Note 101 studies in the DTV proceeding because of the recognition that such studies are more accurate and reliable than the standard prediction methodology.

has contemplated the use of supplemental showings at the allotment stage under appropriate circumstances. The *Report and Order* does not explain why such showings cannot be utilized in the hybrid *Woodstock* circumstances, it only observes that none has yet been accepted. The Commission has set forth no reasoned explanation in the *Report and Order* that would justify a departure from its established, well-reasoned formulation under *Woodstock*. See *Channel 51 v. FCC*, 79 F.3d 1187, 1191 (D.C. Cir. 1996) ("If [the Commission] is to depart from its prior ruling, it must provide a reasoned explanation").

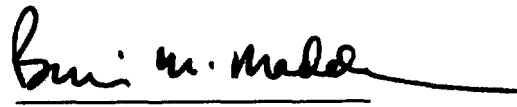
ECI believes that the Commission should not act to foreclose the possibility that a qualified applicant may make the necessary showing to employ supplemental showings of coverage in these highly limited types of upgrade allotment cases. ECI presently has pending before the Commission a "one-step" application to upgrade Station WISP(FM) in Holmes Beach to Channel 254C2 (FCC File No. BPH-940928IF). ECI's demonstration of city-grade coverage of Holmes Beach is based on both the use of Tech Note 101 prediction methodology and on actual field strength measurements undertaken in accordance with the procedures set forth in Section 73.314(c) of the rules. Not only do the actual measurements undertaken establish full coverage of the city of license, see *Sonora* at 6043, because ECI's supplemental Tech Note 101 showing does not suffer from the deficiencies that were found in *Sonora*, *Caldwell*, *Ocracoke* and other cases, ECI believes that its proposal is fully consistent with prior Commission precedent.⁵

⁵ Indeed, in a decision issued November 27, 1995 in connection with ECI's related
(continued...)

For the foregoing reasons, ECI respectfully requests that the Commission reconsider and clarify its decision in the *Report and Order* regarding the use of supplemental showings in allotment cases, and continue to permit such studies to be used at the allotment stage to reflect the effect of actual terrain data on signal coverage under those circumstances which qualify under the *Woodstock* policy.

Respectfully submitted,

ECI LICENSE COMPANY, L.P.

By: 

Brian M. Madden
John D. Poutasse

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(202) 429-8970

October 30, 1997

Its Attorneys

⁵(...continued)

application for a downgrade in class of Station WTKF(FM), Crystal River, Florida (FCC File No. BPH-940928IG), the Audio Services Division relied upon *its own* Tech Note 101 study to confirm city coverage over Crystal River. However, if the Commission elects to prohibit the use of supplemental contour prediction methodologies under such circumstances and to overrule the *Woodstock* policy, the Commission should confirm that any such change in policy will have prospective effect only. Thus, applications pending before the Commission that were filed in reliance on *Woodstock*, including ECI's "one-step" upgrade application for Holmes Beach, should be reviewed in accordance with that decision. See *Bowen v. Georgetown University Hospital*, 408 U.S. 203, 208 (1988) ("Retroactivity is not favored in the law").